89-1980

SUPREME COURT, U.S.
FILED
MAY 22 1990

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MARVIN STONE

Petitioner,

-vs-

UNITED STATES OF AMERICA

Respondent.

Petition for Writ of Certiorari

to the

United States Court of Appeals

for the

Sixth Circuit, Cincinnati, Ohio

MARVIN STONE pro se

Box 12115

Lexington, KY 40580

QUESTIONS PRESENTED

1. Whether the government's evidence was insufficient as a matter of law to sustain petitioner Stone's convictions for mail fraud, in light of 'today's judicial amendment to the mail fraud statute' since the Supreme Court's decision in the McNally case and the Sixth Circuit's decision in the Runnels case, in that the person or persons alleged in the indictment 'as having been defrauded'-- were not defrauded of money or property within the categories laid down in the McNally or Runnels cases; or by inference since these decisions, the mail fraud statute will only reach a conviction -- if money or property (or a deprivation) is obtained from a victim or person defrauded. Or, stated another way, the mail fraud statute will not reach a conviction in the absence of proof that anyone (alleged in the indictment as having been defrauded) suffered a loss of tangible property or a deprivation thereof. Or stated yet another way, should the

indictment be set aside, as it covered the wrong victims, since those persons alleged in the indictment as having been defrauded of money or property -- were not the victims.

2. Whether the government's evidence was insufficient, and the indictment in error, in light of the Runnels decision, in that petitioner Stone, from the substantive counts in the indictment apart from the conspiracy counts, received no 'economic benefit' -- under the 'economic benefit theory' from anyone alleged in the indictment -- as having been defrauded.

STATEMENT AS TO PARTIES

The names of the parties to this cause are stated in the caption herein.

TABLE OF CONTENTS

Prayer for issuance of writ 1
Questions presented 2
Statement as to parties 3
Table of authorities 4

Decisions below 5

Jurisdiction of this Court 5

Statement of the facts 6

Argument number one 11

Argument number two 18

Conclusion 22

APPENDIX

Decision of U.S. District Court 1a

Decision of U.S. Court of Appeals 6a

Rehearing Decision 15a

TABLE OF AUTHORITIES

McNALLY v. UNITED STATES 97 L Ed 2d, 292

UNITED STATES v. RUNNELS 86-1923

Appendix

Decision of U.S. District Court 1a

Decision U.S. Court of Appeals 6a

Rehearing decision 15a

DECISIONS BELOW

The opinion of the U.S. District Judge, the Honorable Eugene E. Siler, Jr., is reproduced at page 1a of the Appendix.

The opinion of the United States Court of Appeals for the Sixth Circuit is reproduced at page 6a and 15a of the Appendix.

JURISDICTION OF THIS COURT

Petitioner filed a Writ of Error Coram Nobis at the U.S. District Court after the McNally decision was reported, and, the case was dismissed by the Honorable Judge Eugene E. Siler, Jr., as in the Appendix.

Petitioner then filed an appeal to the Sixth Circuit Court of Appeals, citing the McNally decision and the Runnels decision, since the indictment lists the wrong persons as victims; and that the person alleged to have been defrauded suffered no deprivation of money or property; and that none of the 330 real victims was ever called; and that petitioner received no economic benefit in

the case; but, the lower Court's decision was sustained on appeal.

The petitioner now appeals to this Court for relief.

STATEMENT OF THE FACTS

Petitioner is a Canadian national, who acted solely as a broker in the sale of coal properties in Kentucky; it was petitioner's misfortune to broker 12 coal-properties to a group of buyers, who later turned out to be swindlers and promoters who concocted illegal tax-shelters, scammed $5 million from 330 investors who were the real victims; and these tax-shelter promoters and masterminds were never indicted nor convicted by the government or courts; instead, and unbelievably, the government in its unfathomable wisdom and inimitable style indicted petitioner and a local coal-miner who were 'minnows' in the transaction, and utilized the tax-shelter promoters who were the 'whales' as the chief government witnesses.

It was these swindlers who were alleged in the indictment as having been defrauded.

This is a case in which it can truly be said that the wrong persons were prosecuted. The defendants Edwin Driggers and petitioner did not conspire to defraud Richard Wellbrock or any of the investors in Wellbrock's tax-shelter scheme. Rather the proof showed overwhelmingly, and beyond any doubt that it was Richard Wellbrock, the architect, the mastermind, the financial genius, who created this massive tax-shelter scheme, along with his associates and minions, and a major New York law firm, from which Wellbrock personally reaped a harvest of approximately $4.9 million, together with a tax-write-off through a tax-shelter called Sequoia of $7 million.

The story of this case starts with the meeting in early 1977 between petitioner and Wellbrock, a self styled "financial consultant" since 1972, during which petitioner introduced Wellbrock to the availability of

coal properties in Eastern Kentucky. Following this meeting Wellbrock travelled to Kentucky where he met Edwin Driggers, a long time coal operator and dealer in coal properties. Wellbrock arranged to acquire a number of properties either in the form of leases or fee properties. Thereafter Wellbrock arranged for the acquisition of these properties, the creation of 12 different tax-shelter limited partnerships, all bearing the names of trees such as "Birch," "Redwood," "Maple," and the like, to differentiate them. Each limited partnership had a different general partner (or partners), and Wellbrock referred to them all as his "clients," but all of them were his 'minions' and in the game together.

Wellbrock used a great many corporate and other entities by which he created his tax-shelter scheme. In addition to the 11 limited partnerships in which he caused partnership interests to be sold to the public, through this "clients," the general

partners for a total aggregate selling price of more than $5 million, he created "Sequoia," which was kept only for his "insiders." These included his associates, his lawyers and his general partners. It is important to note that the "Sequoia" partnership was not part of the indictment.

Wellbrock acknowledged that the "Offering Memorandum" books for the 11 limited partnerships were created by him and that he wrote many of the papers included therein. All eleven books were received in evidence. An examination of the different books revealed how closely they resembled each other. Except for the different named trees, general partners, and properties involved, they are virtually Chinese copies of each other. The so-called tax opinions are identical, and were all written as of the same date.

There were some 330 'investors' defrauded by Wellbrock, who subscribed to become limited partnership investors in Wellbrock's tax-shelter schemes in Kentucky,

and not one testified. These 330 'investors' were really the ones who 'formed limited partnerships' -- as in the indictment, and were the victims in actual fact who were defrauded of 'tangible property." These 300 'investors' were defrauded of the total funds advanced in the entire transaction, and these funds were advanced to Wellbrock or his general partners -- who indeed 'sucked-up' the entire $5 million advanced by the 'investors' in the Kentucky partnerships. Thus, the real fraud was perpetrated by Wellbrock -- the person in the indictment alleged to have been defrauded -- against 330 'investors,' none of whom was brought forward by the government to testify about a loss of property or tangibles, and none was ever called as a witness -- to state that he -- dealt with defendants. Of course none of the investors -- ever met defendants.

Lastly, after the trial and sentencing, petitioner volunteered to the prosecutor that petitioner -- or his companies earned about

$80,000 in broker's commissions on the sale of properties from various landowners (not from Wellbrock), and these sums were never referred to, nor ever proven at trial. The reason for this admission -- was that the prosecutor in an extremely humane and gentlemanly effort, attempted to reduce petitioner's sentence with the Parole Commission, for which effort petitioner remains eternally grateful. The prosecutor, should therefore be in no position to state, or to try to say that petitioner gained this $80,000 as 'petitioner's participation in the offense,' as these sums were never brought up, nor proven at trial, and in any event were brokerage commissions received from landowners, and not one 'red cent' of property or money was received by petitioner from Wellbrock or his general partners.

ARGUMENT

1. Petitioner's claim remains that the government's evidence was insufficient as

a matter of law to sustain petitioner's convictions for mail fraud, in light of today's judicial amendment to the mail fraud statute -- since the Supreme Court's decision in the McNally case -- in that the person or persons alleged in the indictment as having been defrauded -- were not defrauded of money or property within the categories laid down in the McNally case, or from the Sixth Circuit's Runnels decision; or, by inference since these decisions, the mail fraud statute should only reach a conviction -- if money or property (or a deprivation) is obtained from a victim or person defrauded. Stated another way, the mail fraud statute should not reach a conviction in the absence of proof that anyone (alleged in the indictment as having been defrauded) suffered a loss of tangible property or a deprivation thereof.

An enormous fraud was perpetrated here against 330 investors, who were defrauded by Wellbrock, the tax-shelter promoter; and it was these 330 investors who 'lost tangible

property' or $4.9 million in Kentucky on the tax-shelters constructed by Wellbrock, the prime person alleged in the indictment as having been defrauded. Certainly Wellbrock for his part, did not suffer any loss of tangible property whatsoever; he stole $4.9 million; and, the government failed to produce one iota of evidence from any one of the 330 investors who formed limited partnerships.

Petitioner submits that the McNally decision, by inference, limits the mail fraud statute by imposing a requirement that a scheme or artiface to defraud, does not violate the statue, unless its purpose is to defraud someone of money or property or tangibles. Petitioner submits that his mail fraud convictions become reversed, and that the conspiracy counts should also become reversed.

These judicial amendments (from McNally and Runnels) were not put in issue at petitioner's trial, or passed upon by the trial

Court, and if known at the time of trial by the Court, rendition of the judgment would have been prevented; and there has been no delay by petitioner; and that petitioner should be entitled to utilize the McNally and Runnels decisions retroactively, to set aside his mail fraud convictions.

In brief, the thrust of petitioner's appeal -- is that the person or persons alleged in the indictment as having been defrauded -- were not 'defrauded of money or property' or tangibles within the meaning or principle laid down by the McNally court, or by inference from that decision; and that the real victims -- the 330 'investors' were never produced for any proof of any losses.

Strangely, the most important element (in retrospect) of the entire case, was the missing proof. Since the indictment alleged a conspiracy and mail fraud by defendants against 'persons to be defrauded' or 'victims,' the fact is, that not one witness was called by the prosecution, who testified

that he was defrauded of money or property by the defendant's ostensible activities, or that he lost tangible property in the Wellbrock tax-shelter venture by reason of defendant's acts. There were 330 persons who purchased limited partnership interests from Wellbrock's clients (the general partners), yet, not a single one of the investors testified as to his having lost anything by his investment in Wellbrock's tax-shelter program. Thus, the indictment seems to list the wrong victims as persons -- alleged to have been defrauded.

Moreover, the general partners also did not testify that they had lost money by anything done by defendants. Three of them were called as witnesses: Joseph Newey, Milo Darrell Nilson, and Richard McCleur. None testified as to losing money or tangibles; in fact -- all made money on the deal. Their only worry was that the IRS might disallow their tax deduction claimed by them on their illegal 15 to 1 tax-shelter write-off in

"Sequoia Partnership," with tax deductions having to be repaid to the government with interest and penalties. Hence Mr. Newey's testimony that he and his partner Nilson's investment of $13,300 in the "Sequoia Partnership" (which incidentally was paid to Atlantic Energy -- a Wellbrock company -- and not petitioner) may have been lost along with their illegal $300,000 write-off.

If any investor has lost his investment or money or tangibles, he has not come forward to testify about it. Since the names of all limited partners are set forth in the 'offering memorandum' or closing books, all of which were in evidence, the government surely knew who they were and how to communicate with them, so as to call them as witnesses. It cannot be gainsaid that the government did not look up these investors, and interview them as to their participation in Wellbrock's tax-shelter scheme. If any of them had lost money on their tax-sheltered investment, they would have screamed all the

way to the Courthouse to give testimony against those they believed to be responsible for their losses. The absence of their testimony is strong negative evidence -- of no loss of money or property by these persons by virtue of defendants' conduct. Moreover, there is no evidence that any of these investors dealt with defendants or even knew of them. Astoundingly, every bit of tangible property in the entire case was paid by these same 330 investors (none of whom was ever produced) to those persons alleged to have been defrauded, namely to Wellbrock or his general partners -- whom the government should have indicted in the first place.

Thus, it seems that the indictment covered the wrong victims; those persons mentioned in the indictment as having been defrauded of money or property -- were not the 'victims' at all; and the government erred in the indictment -- as having Wellbrock as being the principal person -- as having been defrauded -- or having his

cohorts, the general partners, as having been defrauded -- and they were not. The government erred as well -- in not producing or calling any one of the real victims -- the 330 'investors' who lost the money or property.

Petitioner prays that this Court will not allow convictions based upon an erroneous indictment or erroneous proofs -- to stand.

2. The government's evidence was insufficient as a matter of law, and the indictment was in error, as from the decision in the Runnels case, the 3 substantive counts in the indictment apart from the conspiracy counts, must now fail inasmuch as petitioner received no economic benefit (under the economic benefit theory) from anyone alleged in the indictment as having been defrauded.

The government erred as it named Richard Wellbrock the principal character in the indictment, as the person ostensibly defrauded or to be defrauded. The government did not name nor call any one of the 330

investors who were the real victims in the case, nor did the government produce one iota of evidence from any one of the 330 investors, that they had lost anything by virtue of their investment in Wellbrock's tax-shelter program, or that any one of the 330 investors dealt with petitioner or defendants at all.

Thus, by inference from the principles enunciated in the Runnels case, none of the 3 substantive counts, nor any proofs relating to these counts, showed the flow of any 'economic benefit' to petitioner, since petitioner received land commissions from landowners, and received nothing (under the economic benefit theory) whatsoever from Wellbrock nor anyone alleged in the indictment as having been defrauded of money or property.

Now, when and if the government is given the opportunity to file a brief in reply, the government will recite 'two old litanies': the first is that petitioner received an

economic benefit of $80,000 as 'petitioner's participation in the offense;' and the second is that one general partner, namely Joseph Newey, testified that he and his co-general partner Darrell Nilson 'may have lost their $13,300 investment in Sequoia Partnership;' and sadly, this familiar litany was repeated by the Justices on appeal.

Well, nothing could be further from the truth, as the cold hard facts are that this $80,000 figure arose post trial only, and from a letter written by the prosecutor to the Parole Commission -- where prosecutor tried in a gentlemanly attempt to reduce petitioner's sentence. Indeed the prosecutor himself concedes in his Sixth Circuit Appellate brief dated July 15th, 1988, on page 19, lines 9 and 10 thereof -- "that appellant was not proven to have received $80,000 in commissions at trial." Besides, these commissions were received from landowners on a large number of properties for which petitioner was not charged nor indicted.

In respect of the allegation that one general partner, namely Joseph Newey, testified about a possible loss of the sum of $13,300, again the cold hard facts are that these funds were paid to Atlantic Energy, a Wellbrock company; these funds relate to a limited partnership known as "Sequoia," which is not covered by the indictment -- as petitioner was indicted for sins relating to only 3 partnerships, known as "Birch," "Spruce," and "Hickory," and not "Sequoia."

The District Court in the Runnels case set out two categories which can constitute a scheme to defraud for the purposes of the mail fraud statute, and petitioner relies on the 'tangible economic interest category,' which applicable to this case is simple: did petitioner quite apart from the conspiracy counts, and limited to the 3 substantive mail fraud counts, receive any economic benefit from Wellbrock or any one in the indictment, as having been defrauded? No, petitioner did not; did petitioner deprive anyone alleged in

the indictment as having been defrauded of money or property? Petitioner did not. The government did not prove one penny of loss or deprivation from those persons alleged to have been 'victims' as caused by petitioner. And again, the government erred in not calling any one of the 330 investor-victims to show that any one of them suffered a loss as a result of petitioner's conduct or any defendant's conduct.

Petitioner prays that this Honorable Court will take up this issue and rule thereon.

CONCLUSION

For the reasons set forth herein, petitioner submits that his convictions for mail fraud (and conspiracy) be set aside under the 'economic benefit theory,' as petitioner was not proven to receive nor did receive any economic benefit from those persons alleged in the indictment as having been defrauded of money or property.

And for the reason that the government erred in the indictment as having Wellbrock as being the principal person -- as having been defrauded. He was not.

And for the reason that the government erred in the indictment as having 3 other persons who were the general partners (Wellbrock's cohorts) as victims who were allegedly deprived of money or property. They were not.

And for the reason that the government erred in the indictment -- as the indictment covered only "Birch," "Spruce" and "Hickory" partnerships, and did not cover the partnership known as "Sequoia."

And for the reason that the government erred in not calling or producing any one of the 330 'investors' who were the real victims who lost money or property.

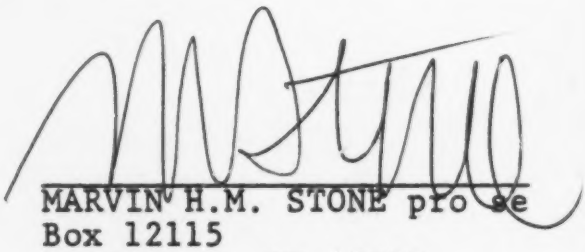
This petition for Certiorari is respectfully submitted by petitioner.

MARVIN H.M. STONE pro se

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Writ of Certiorari of the Petitioner MARVIN H.M. STONE, has this 15th day of June, 1990, been made upon the Solicitor General, may mailing three true copies in the United States mail, postage prepaid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530



MARVIN H.M. STONE pro se
Box 12115
Lexington, KY 40580

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CRIMINAL NO. 82-14

UNITED STATES OF AMERICA PLAINTIFF,

VS: ORDER

MARVIN STONE DEFENDANT.

In accordance with the Memorandum of even date, it is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

1. The motion to correct an error at the sentencing on January 3, 1983, be and is denied.

2. The motion for a judicial recommendation against deportation be and is denied.

3. The petition for a writ of error coram nobis be and is denied.

This is a final and appealable Order, and there is no just reason for delay.

This _____ day of April, 1988.

EUGENE E. SILER, JR.
Chief Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CRIMINAL NO. 82-14

UNITED STATES OF AMERICA PLAINTIFF,

VS: MEMORANDUM

MARVIN STONE DEFENDANT.

The defendant has moved the Court to correct an error occurring at the sentencing on January 3, 1983, filed a motion under §241(b) of the Immigration and Naturalization Act, and for a writ of error coram nobis, to set aside his conviction for mail fraud. For the reasons set out herein, the motions will be denied.

First, the defendant requests the Court to correct an error at the time of sentencing. Although the record has long since been sent to the Record Center, the matter apparently was raised at the time of sentencing, and the Court declined to rule on it at the time. Nevertheless, at the time the defendant moved the Court to reduce his

sentence under Rule 35, the Court did deny the motion. Moreover, at the time of the initial sentencing, the Court would not have been able to make a recommendation that the defendant not be deported, for the defendant did not follow the procedure required under 8 U.S.C. §1251(b)(2), as due notice was not given to representatives of the Immigration and Naturalization Service, so that they could be granted an opportunity to respond in the matter. At this time, however, the Court does not have jurisdiction to make such a recommendation See Pacheco v. INS, 546 F.2d 448 (1st Cir. 1976), cert. denied, 430 U.S. 985 (1977). If the defendant had wanted the Court to make a positive recommendation about deportation, he should have filed his motion within thirty days of the time of the sentencing. As he did not, and as he and his counsel are both attorneys, he cannot now complain that the Court failed to take action as requested. This Court finds that it neither has jurisdiction to correct an error

in the Judgment nor make a judicial recommendation at this time, as the statute is quite clear that a recommendation can only be made within a period of thirty days of sentencing. If it were clear that the Court could at any time make a recommendation, the law would not read the way it does.

With regard to the petition for a writ of error coram nobis, the conviction in this case was unlike that in McNally v. United States, _____ U.S. _____, 107 S.Ct. 2875 (1987). That case held that the mail fraud statute, 18 U.S.C. §1341, did not apply to an intangible right to an honest government. In the conviction here, there was no intangible right, but there was an actual gain to the defendant and to others. It was clearly a mail fraud involving the loss of property. Therefore, the motion for a writ will be denied because McNally is inapplicable.

This _____ day of April, 1988.

EUGENE E. SILER, JR.
Chief Judge

No. 88-5445

UNITED STATES COURT OF APPEALS

CR 82-14

FOR THE SIXTH DISTRICT

UNITED STATES OF AMERICA	)	
	)	ON APPEAL FROM
Plaintiff-Appellant,	)	THE UNITED
	)	STATES
v.	)	DISTRICT COURT
	)	FOR THE
MARVIN STONE,	)	EASTERN
	)	DISTRICT OF
Defendant-Appellee.	)	KENTUCKY

Decided and Filed _____

Before: WELLFORD and NELSON, Circuit Judges, and SUHRHEINRICH, District Judge*

PER CURIAM. Defendant Marvin Stone appeals the district court's denial of a petition for writ of error coram nobis. For the reasons that follow, we AFFIRM.

---

*Honorable Richard F. Suhrheinrich, United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

On May 8, 1982, the United States filed an indictment against defendant Stone and two co-defendants, Edwin Driggers and Roy Cornelius, charging them with conspiracy to defraud individuals who formed limited partnerships in order to invest in tax shelter programs in violation of 18 U.S.C. §371 and with three counts of mail fraud in violation of 18 U.S.C. §1341. Driggers and Stone were found guilty by a jury on all counts.

Stone received a three year sentence and a fine of $10,000 on the conspiracy conviction and suspended concurrent five year sentences on each of the mail fraud convictions. Stone appealed his conviction to this Court. The Court affirmed the decision of the district court. See United States v. Stone, 748 F.2d 361 (6th Cir. 1984).

After the Supreme Court issued its opinion in McNally v. United States, 483, U.S. 350 (1987), defendant filed a petition

for writ of error coram nobis on the ground that McNally required reversal of his conviction for mail fraud. The district court rejected defendant's assertion that he was convicted under an intangible rights theory, and refused to vacate his sentence in light of McNally.

On February 8, 1988, defendant filed his notice of appeal of the district court's decision. On November 4, 1988, this Court upon sua sponte consideration, held these proceedings in abeyance pending a decision in the case of United States v. Runnels, 877 F.2d 481 (6th Cir. 1989)(en banc). In Runnels, this Court examined the issue of whether Runnels' conviction under the mail fraud statute, 18 U.S.C. §1341, could be upheld in light of the McNally case. On June 23, 1989, this Court issued its decision on rehearing in Runnels, finding that McNally required reversal of Frank Runnels' conviction. Shortly thereafter, the Court directed the parties in the instant case to

file supplemental submissions addressing the impact of Runnels on this appeal.

II.

Stone argues that the Supreme Court's holding in McNally and this Court's decision in Runnels require a reversal of his conviction for mail fraud. In McNally, the Supreme Court held that the federal mail fraud statute, 18 U.S.C. §1341, in proscribing schemes "'to defraud' or 'for obtaining money,'" was directed only to violations "'wronging one in his property rights....'" 483 U.S. at 358. The McNally defendants were charged with violating §1341 by devising a scheme to defraud the Commonwealth of Kentucky's citizens and government of certain "intangible rights," such as the right to have the Commonwealth's affairs conducted honestly. 483 U.S. at 352. The Supreme Court reversed the defendants' convictions, ruling that 18 U.S.C. §1341 is limited in scope to protecting property rights and does

not reach schemes to defraud individuals, the people, or the government of "intangible rights." Id. at 358-60. In so finding, the Court reversed the broad interpretation of the mail fraud statute that had been adopted by this Court and each of the other courts of appeals that had addressed the issue. Id.

In Runnels, as in the instant case, defendant appealed his mail fraud conviction to this Court on the grounds that the McNally decision dictated a reversal. The government in that case had proceeded against defendant on a theory that Runnels had engaged in a scheme to defraud union members of the right to have the business of the local conducted honestly. Runnels, 877 F.2d at 482. This Court, applying McNally, noted that Runnels was indicted and convicted solely on an intangible rights theory. On this basis the court reversed the decision of the district court and vacated Runnels' conviction for mail fraud. Id. at 490-91.

In the instant appeal, Stone contends that McNally and Runnels require the government to prove actual loss to those defrauded by the scheme. Specifically, Stone argues that he was essentially convicted under an intangible rights theory because none of the victims he allegedly defrauded testified at trial as having actually suffered any tangible loss. Defendant's argument presumes that the government is required to prove actual loss under the mail fraud statute. This Court has already held that proof of actual injury is not an element of the offense. In United States v. Valavanis, 689 F.2d 626 (6th Cir. 1982), this Court stated:

> A conviction under the mail fraud statute does not require proof of actual injury. The elements of the crime "are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. Pereira v. United States, 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed.435 (1954). The first element is satisfied by proof of the intent to execute a scheme to defraud, it does not require that the scheme be completed or successfully carried out.

Id. at 627 (emphasis in original) (citations omitted). In addition, neither McNally or Runnels require the government to prove actual injury.

It is clear from a reading of the indictment that Stone was not indicted and convicted under an "intangible rights" theory in violation of McNally and Runnels. The theory alleged in the indictment is that Stone defrauded certain investors of the money they had invested in the tax-shelter scheme.[1] In addition, although the government was not required to prove actual loss, the trial record reveals that Stone actually

---

[1] Court II of the indictment, which charges defendant, inter alia, with violations 18 U.S.C. §1341, provides in pertinent part:

> From on or about January 1, 1977 and continuing to on or about January 18, 1978, in the Eastern District of Kentucky and elsewhere outside the Eastern District of Kentucky,

received $80,000 in commissions for his participation in the scheme, money which came

---

EDWIN DRIGGERS

ROY K. CORNELIUS

and

MARVIN STONE

did devise and intend to devise a scheme and artifice to defraud and obtain money by means of fraud and fraudulent pretenses, representations, and promises from certain individuals who performed limited partnerships for the purpose of investing in tax shelter programs, said partnerships being known as:

Birch Associates

Spruce Associates

Hickory Associates

well knowing at the time that the pretenses, representations, and promises would be and were false and fraudulent when made and which scheme and artifice so devised and intended to be devised by said defendants was as follows....

(Emphasis added.)

from investors in the scheme. Joseph Newey, one of those investors, testified that he and his partner Milo Nilson lost their investment of $13,300 and their expected tax deduction.

The Court finds appellant's arguments to be without merit. Accordingly, the opinion of the district court is AFFIRMED.

MANDATE ISSUED: APRIL 11, 1990

NO COSTS TAXED

No. 88-5445

UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

O R D E R

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

MARVIN STONE,

Defendant-Appellant.

BEFORE: WELLFORD and NELSON, Circuit Judges; SUHRHEINRICH, District Court Judge.*

Upon consideration of the petition for rehearing filed by the appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*The Honorable Richard F. Suhrheinrich, District Judge for the Eastern District of Michigan, sitting by designation.